In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-883

CARMELLO PLUCHINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of having committed an assault within federal territory (Washington National Airport), in violation of 18 U.S.C. 113(d). He was sentenced to thirty days' imprisonment (100a–101a).[1] The court of appeals dispensed with oral argument and affirmed on October 10, 1972; petitioner's application for rehearing was denied on October 31, 1972 (Pet. App.). The petition for a writ of certiorari was not

[1] Page numbers refer to petitioner's Appendix in the court of appeals, consisting of the transcript of the trial and docket entries in the case. We are lodging a copy with the Clerk of this Court.

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filed until December 15, 1972, and is therefore out of time under Rule 22(2) of this Court. There is, in any event, no reason to grant the writ.

On May 29, 1971, at approximately 12:00 noon, petitioner, a taxi owner-driver, delivered a fare to Washington National Airport and picked up two other passengers (47a–48a). An altercation then began between petitioner and Robert Belles, a Greyhound taxicab dispatcher. Petitioner and another defense witness testified that Belles was the aggressor; no other witness saw the beginning of the incident (49a, 89a).[2] Janie Brown, a stewardess, saw the fight in progress and observed that Belles was not defending himself. After the fight stopped, Belles leaned over as if to pick something up, and petitioner then struck him hard on the head with his fist (16a–17a). Kay McDonald, another stewardess, gave similar testimony (26a–27a). Billy Blair, a skycap, also stated that petitioner struck Belles after hostilities had seemingly ceased (34a); the testimony of Robert Plavnik, another government witness, was in accord (42a). Neil Johnson, a taxicab driver called by the defense, testified on cross-examination that after the fighting ceased, petitioner hit Belles (93a–94a, 96a).

1*a*. Petitioner contends that he was constitutionally entitled to present oral argument in the court of appeals. This Court has held that oral argument on appeal "is not an essential ingredient of due process * * *." *Price* v. *Johnston*, 344 U.S. 266, 286. While

[2] Belles, at the time of the trial, was confined to a wheelchair and unable to speak (7a–8a).

the opportunity to argue has been favored, it is not a matter of right. *United States* v. *Baber,* 447 F.2d 1267, 1270–1271 (C.A.D.C.), certiorari denied, 404 U.S. 957; *United States* v. *Koptik,* 300 F.2d 19, 23–24 (C.A. 7), certiorari denied, 370 U.S. 957; *Torzillo* v. *Goldmann,* 190 F. Supp. 504, 505 (D. N.J.), affirmed *per curiam,* 293 F.2d 273, certiorari denied, 368 U.S. 991. In recent years, courts of appeals have found it increasingly necessary to dispense with oral argument in order to expedite disposition of cases. See *Isbell Enterprises, Inc.* v. *Citizens Casualty Co.,* 431 F.2d 409, 410–414 (C.A. 5).[3] Summary affirmance is also expressly sanctioned by Rule 7(b) of the Rules of the Fourth Circuit in cases where the panel concludes that the appeal is frivolous and lacking in merit. The court of appeals in this case evidently concluded that oral argument would not substantially aid its understanding or disposition of the case. Cf. Fed. R. App. P. 34(b).

b. Petitioner's contention that he was denied a fair hearing because two district judges sat on the appellate panel by designation is not well taken. 28 U.S.C. 292(a) provides that one *or more* district judges may be so designated when the business of the court of appeals requires. Moreover, there is no reason why the judges would have a "subconscious tendency" to affirm the decision of a "brother trial judge" unjustifiably (Pet. 11).

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[3] This Court has declined to entertain challenges to the practice in the Fifth Circuit. *United States* v. *Revel,* 455 F.2d 608 (C.A. 5), certiorari denied, 407 U.S. 922; *United States* v. *Bays,* 448 F.2d 977 (C.A. 5), certiorari denied, 405 U.S. 957.

2. Petitioner also challenges the sufficiency of the evidence, but the cases he cites are not in point. Each of them deals with the permissible use of force to repel an attack, or with the use of force during the progress of a fight. Here, however, every eyewitness with the exception of the petitioner testified that the altercation had actually stopped before petitioner struck the final blow. The district court found "that he went far beyond what was necessary to protect himself * * *" (100a). Under these circumstances, the verdict of the trier of fact must be sustained. *Glasser* v. *United States,* 315 U.S. 60, 80; *United States* v. *Lowery,* 306 F.2d 133, 135 (C.A. 4).

3. Finally, petitioner contends that he was denied a speedy trial in violation of the Sixth Amendment, since the trial was held nearly eight months after the incident which gave rise to the charge. In *United States* v. *Marion,* 404 U.S. 307, 320, however, this Court declared that the speedy trial right attaches only after the defendant has been arrested or named in a formal indictment or information. Here a complaint was filed on December 16, 1971, and an information was filed on January 10, 1972. Trial was held on January 20, 1972. In these circumstances, there was no denial of the right to a speedy trial. See generally, *Barker* v. *Wingo* 407 U.S. 514.

While "substantial prejudice" resulting from pre-arrest or pre-complaint delay may give rise to a due process violation (*United States* v. *Marion, supra,* 404 U.S. at 324), petitioner's only claim of prejudice does not approach this level. Petitioner contends that a subpoena for one of his witnesses was not served, and at-

tributes this to the delay preceding the complaint. But, petitioner was able to produce several other witnesses, including another eyewitness. The absence of a potential witness due to delay is prejudicial only when there is a reasonable possibility that the defendant would not have been convicted if the witness had been available. *Estrella* v. *United States,* 429 F.2d 397, 400 (C.A. 9), certiorari denied, 400 U.S. 1011; *United States* v. *Walton,* 411 F.2d 283, 288 (C.A. 9). Petitioner does not suggest what the missing witness might have added to the testimony in the case; nor does he show any effort to procure the attendance of the witness, other than the issuance of the subpoena.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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